THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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WRIT PETITION No.5373 of 1998

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Dated :19-10-2005

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Between:

Jagini Textiles.

.. **PETITIONERS**

AND

S.Ramesh and another.

.. RESPONDENTS

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ORDER:

Aggrieved by the order passed in S.A.No.1 of 1997, dated 17-01-1998, by the Appellate Authority and Assistant Commissioner of Labour, Nalgonda, under Section 53 of A.P.Shops and Establishments Act, 1988, the present writ petition is filed.

Facts, to the extent for this writ petition, are that the first respondent was employed in the shop of the petitioner on daily wages as an Assistant Helper from January 1989 till 04-03-1992 and to have, thereafter, absconded from duty without intimation. It is the case of the petitioner that despite having issued notice, calling upon the first respondent to report for duty, failing which it would be presumed that he had abandoned service, the first respondent refused to receive the said notice as he was gainfully employed in another shop. The petitioner claims to have been under the bonafide belief that the first respondent had abandoned service from 05-03-1992 onwards.

The first respondent filed an application, in case No.1/93, under Section 50 of the A.P.Shops and Establishments Act before the Labour Officer, Nalgonda, which was allowed. Against the order of the Labour Officer, in case No.1/93, the petitioner filed the appeal in S.A.No.1/97, under Section 53 of A.P.Shops

and Establishments Act, before the second respondent, who by order dated 17-01-1998, confirmed the order of the Labour Officer. Aggrieved thereby, the present writ petition is filed.

It is seen from the order of the appellate authority that the petitioner was directed to pay a sum of Rs.64,389.20 to the first respondent towards wages due, service compensation etc., the break up of which is as under:

"i)Wages due from 01-02-92 to 04-03-92 -Rs. 826-45

ii) One month notice pay -Rs. 716-25

iii) Service Compensation -Rs. 1074-40

iv) Leave encashment -Rs. 1074-40

v)i) Difference in pay as per M.Wages -Rs. 2066-95

ii) Penalty (10) times -Rs. 20669-50

vi) Wages payable from 5-3-92 to 9-9-96

i.e., date of termination to till date -Rs. 37961-25

Total: -Rs.64389-20

Insofar as item Nos.1 to 4 are concerned, Sri G.Vidya Sagar, learned counsel for the petitioner, would fairly concede that whatever may have been the grounds raised before the appellate authority, the petitioner is not pressing for denial of payment of these amounts to the first respondent. Even with regards item No.5(i), which relates to difference in pay as per the Minimum Wages Act. Sri G.Vidya Sagar, learned counsel for the petitioner, would fairly submit that while it was the case of the petitioner that the second respondent did not have jurisdiction to adjudicate this issue, since, however, payment relates to minimum wages of a workman, he is not questioning the order directing

payment of the said amount to the first respondent. The entire dispute, therefore, revolves round item No.5 (ii) which relates to penalty of ten times of Rs.20,669-50 and item No.6 which relates to wages payable from 05-03-1992 to 09-09-1996 i.e., from the date of termination till the date of the order in S.A.No.1/97.

Under Section 47(4), of the A.P.Shops and Establishments Act, where service compensation is payable under Section 47 to an employee, such employee shall be entitled to receive his wages from the date of termination or cessation of his service until the date on which the service compensation so payable is actually paid. On the ground that the petitioner had failed to pay the service compensation of Rs.1,074-40 to the first respondent, the second respondent, confirmed the order of the Labour Officer, mulcting the petitioner with payment of Rs.37,961-25 under Section 47 (4) of the A.P.Shops and Establishments Act.

The Full Bench of this court in ***SRINIVASA RESORTS LIMITED*** *v.* ***STATE OF ANDHRA PRADESH,*** while examining the constitutional validity of Section 47(4) of the A.P.Shops and Establishments Act, held thus:

> "…… We may now examine sub-section (4) of Section 47. It seeks to continue the relationship of employer and employee despite cessation of employment insofar as the employer has to go on paying him wages unless the dues in terms of sub-section (3) of Section 47 are actually paid. Sub-section (4) of Section 47 is patently arbitrary and unreasonable. Such a provision can be no stretch of imagination be considered to be protective employment; as it applies also to those employees who have resigned or voluntarily retired. By reason of the said provision, even if an employee resigned the service on his own volition and joined another shop or establishment for higher wages, even then the employer has to pay wages till he

> was paid service compensation even though he gainfully earns in the other shop or establishment. Such a provision, in our view, is contrary to the basic principles of service jurisprudence and would amount to unreasonableness discrimination. Arbitrariness and unreasonableness being inherent in the provision attracting the wrath of Article 14 of the Constitution the same must be held to be unconstitutional."

Since Section 47(4) of A.P.Shops and Establishment Act was held to be unconstitutional, the direction to the petitioner to pay wages from 05-03-1992 to 09-09-1996 for a sum of Rs.37,961-25 ps. is ultra vires and is set aside.

Insofar as the penalty levied, under item No.5(ii) of Rs.20,669.50, is concerned Sri G.Vidya Sagar, learned counsel for the petitioner, while fairly conceding that the Government had issued a notification under Section 5 of the Minimum Wages Act, prescribing the minimum wages payable to workman, would submit that the jurisdiction to levy penalty for non-payment or difference in payment of minimum wages, has been conferred on the authority under the Minimum Wages Act and not the authority under the A.P.Shops and Establishments Act. It is therefore necessary to refer to Section 51 of the A.P.Shops and Establishments Act, which relates to claims arising out of deductions from wages or delay in payment of wages.

Section 51 of the A.P.Shops and Establishments Act, 1988, reads thus:

> **"Claims arising out of deductions from wages or delay in payment of wages etc., and penalty for malicious or vexatious claims**:- (1) Where, contrary to the provisions of this Act, any deduction has been made from the wages of an employee in an establishment or any payment of wages or service compensation to him has been delayed, such employee himself, or if he is dead any of his dependents or any legal practitioner, or

any official of a registered trade union authorized in writing to act on behalf of such employee or dependent, or any Inspector under this Act or any other person acting with the permission of the authority appointed under Section 50 may apply to such authority for a direction under sub-section (2):

Provided that every such application shall be presented within one year from the date on which the deduction from wages was made or from the date on which the payment of the wages or service compensation was due to be made, as the case may be :

Provided further that any application may be admitted after the said period of one year when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

(2) When any application under sub-section (1) is entertained the authority shall, hear the applicant and the employer or give them an opportunity of making representation either in person or through an authorized representative, and after such further inquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer is liable under this Act, direct the refund to the employee of the amount deducted, or the payment of the delayed wages or the service compensation together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted or the amount of delayed wages and not exceeding ten rupees in cash of service compensation :

Provided that, no direction for the payment of compensation shall be made in the case of delayed wages or service compensation if the authority is satisfied that the delay was due to-

(a) a bona fide error or a bona fide dispute as to the amount payable to the employee; or

(b) the existence of exceptional circumstances, such that the employer was unable, though exercising reasonable diligence, to make prompt payment; or

(c) the failure of the employee to accept payment.

(3) If the authority hearing any application under this section is satisfied that it was either malicious or

vexatious, the authority may direct that a penalty not exceeding five rupees be paid to the employer by the person presenting the application.

(4) Any amount directed to be paid under this section may be recovered-

(a) if the authority is a Magistrate, by the authority as if it were a fine imposed by him as Magistrate; and

(b) if the authority is not a Magistrate, by any Magistrate to whom the authority makes an application in this behalf, as if it were a fine imposed by such Magistrate.

Explanation:- For the purposes of this section, the term 'employee' shall include part-time employee also."

It is not in dispute that Minimum Wages were notified and that the notified Minimum Wages was not paid to the workmen. It would therefore amount to delay in payment of wages, in which event, Section 51(2) empowers the authority, under the A.P. Shops and Establishments Act, to levy penalty for a sum not exceeding ten times the amount of delayed wages payable to the workman. As such the contention of Sri G.Vidya Sagar, learned counsel for the petitioner, that the authority under the A.P.Shops and Establishments Act, does not have jurisdiction to levy penalty cannot be accepted. This, however, is not a complete answer to the question raised. The proviso, to Section 51(2), prohibits the authority from directing payment of ten times compensation for delayed wages if the authority is satisfied that the delay was due to a bonafide error or bonafide dispute or the existence of exceptional circumstances, which has resulted in the employer not being able to make prompt payment despite exercising reasonable diligence.

The authority, under Section 51 of the A.P.Shops and Establishments Act, is not only required to apply its mind and satisfy itself that the delay in

payment of minimum wages was not on account of the conditions prescribed under (a) (b) and (c) of Section 51(2) of the A.P.Shops and Establishments Act, but also to assign reasons for levying the maximum penalty of ten times. The impugned order of the 2nd respondent is bereft of reasons in this regard. The order in S.A.1 of 1997 is set aside and the appeal is remanded to the second respondent to examine as to whether the delay in payment of minimum wages was occasioned by any of clauses (a) to (c) of the proviso to Section 51(2) of the A.P.Shops and Establishments Act and thereafter decide the extent of penalty to be levied. It is for the second respondent to decide as to whether the maximum penalty should be levied on the petitioner, or a lesser penalty would suffice. The order of the second respondent, insofar as item Nos.1 to 4 and 5(i) is concerned, is confirmed and insofar as item No.6 is concerned, it is set aside. The amount ordered under item No.5(ii) is set aside and the appeal is remanded to the second respondent for fresh consideration, in terms of what has been stated above, within a period of four months from the date of receipt of a copy of this order.

The writ petition is accordingly disposed of. No order as to costs.

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RAMESH RANGANATHAN, J

Dated: 19-10-2005

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